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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID GALCERAN and ED TEEL

Petitioners,

vs.

EDWARD JOSEPH HARDING,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

This case involves a dispute between Edward Joseph Harding (Respondent) and Sheriff's deputies David Galceran and Ed Teel (collectively, "Petitioners") of the San Dimas Sheriff's Substation, Los Angeles, California. The district court found that Respondent's first and second claims against Petitioners were barred by the statute of limitations and granted Petitioners' summary judgment. The Ninth Circuit Court of Appeals found that the statute of limitations was tolled and reversed.

On October 10, 1984, Respondent, a local businessman, went to the San Dimas Sheriffs substation ("Sheriff

substation") to help bail out a business associate who had been arrested. Respondent spoke to Petitioner Galceran ("Galceran") and became convinced that Galceran was not being as courteous and cooperative as a reasonable civil servant should have been. After several futile attempts by Respondent to clarify the situation of the arrestee, a dispute occurred.[1] The Petitioners told Respondent to leave as they proceeded to use excessive force in effecting his departure. Petitioners did not then and there arrest Respondent for what they considered to be a mere verbal disagreement. However, they freely

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[1]The dispute terminated in Respondent stating to Petitioner Galceran, "You know, officer, your attitude reminds me of one of those moronic small town sheriffs that you see on T.V." (Appendix B, p. B-2 of Petition for Writ of Certiorari.)

vented their passions in proprietary actions taken to threaten, harass, intimidate and eject Appellant from the substation and adjacent public premises. After he left, Respondent called the Sheriff's substation to lodge a complaint about the Petitioners' actions. In a remedial attempt to justify their earlier misconduct and a transparent tactic to nullify Respondent's effort and noticed intent to bring a complaint against them, the following day Galceran filed a four count misdemeanor complaint against Respondent charging him with disturbing the peace, obstructing a peace officer in the performance of his duties, challenging a person in a public place to fight, and making threatening phone calls. The complaint was totally

meritless and lacking in probable cause.[2]

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[2]Two of the alleged offenses, Counts I and II, respectively California Penal Code Sections 415.3 and 148, falsely and fraudulently alleged assaultive conduct by Respondent while he was at the Sheriff substation. Counts III and IV, respectively California Penal Code Sections 415.1 and 653m(a), falsely and fraudulently alleged telephone offenses arising entirely out of Respondent's telephoning the substation to lodge complaints against Petitioners. Counts III and IV failed, on the face of the facts set forth in Galceran's complaint report, to state any crime whatsoever against Respondent. Count IV, moreover, was dismissed at trial pursuant to a "Hitch" motion arising from the wilful and intentional destruction of the original tape-recorded conversations. The original police tape was destroyed, after the trial court had ordered its preservation, as a result of a conspiracy among Petitioners and others to destroy and conceal evidence that would have potentially exculpated Respondent (on said Counts I through IV) and established Petitioners' unlawful conduct at the Sheriff's substation. Due to obstructionist and delaying prosecutorial tactics, the criminal case took approximately nineteen months to come to trial. On May 2, 1986, after a full exploration of the facts of the incident took place in a week long criminal proceeding, a jury acquitted Respondent on the remaining three counts. Petitioners perjured themselves by

The Respondent commenced a § 1983 damage action against Petitioners, and others, on May 1, 1987, within one year of his acquittal on the criminal complaint. Respondent's complaint contained four causes of action and related both to the official misconduct which took place at the San Dimas Sheriff's substation on October 10, 1984, and to the malicious and abusive use of the criminal process which followed the incident and culminated in Respondent's acquittal after nearly nineteen months of delay. The acquittal was the sin qua non of accrual of Respondent's third and fourth causes of action for malicious prosecution which, while dismissed

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testifying to multiple and contradictory versions of the incident at trial.

pursuant to summary judgment, was and remains an integral part of Respondent's § 1983 lawsuit. The Respondent's 1983 complaint alleged that both the use of excessive force at the substation (Causes I and II), as well as the subsequent abuse of process or malicious prosecution (Causes III and IV), were perpetrated by Petitioners for the purpose of preventing Respondent/plaintiff from exercising first amendment rights in a legitimate dispute with and complaint against them.[3]

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[3]Respondent takes exception to the mischaracterization and misstatement of the facts in the Petition for Writ of Certiorari to the extent that they differ from the foregoing account which is substantiated by the reporter's transcript of the criminal proceedings and the acquittal/dismissal of all criminal charges, as well as in the District Court's Memorandums of Decision and Order and the Ninth Circuit's Opinion.

II.

SUMMARY OF ARGUMENT

Respondent asserts that the application of the prohibition/tolling provisions of California Government Code Section 945.3 (hereafter "Section 945.3") to the case at bar is intended and legally correct, appropriate as a functionally and logically related prohibition/tolling scheme coordinate with California Code of Civil Procedure Section 340 (hereafter "C.C.P. § 340), and that the application of this California scheme is not inconsistent with the articulated and paramount federal policies implemented by the Supremacy Clause of the United States Constitution, Article VI (hereafter "Supremacy Clause").

The Petitioners assert that Section 945.3 is not an intended "coordinate"

tolling scheme as indicated by the spatial and contextual arrangement of said provisions within the California Tort Claims Act (hereafter "CTCA"). However, if said prohibition/tolling scheme is applicable to the case at bar as a "coordinate" tolling scheme, then under the Supremacy Clause it must yield in its entirety to the specific federal policies underlying the Civil Rights Act of 1871, § 1983 (hereafter "§ 1983 action").

The District Court, adopted the argument of Mangels v. City of Orange, 678 F.Supp. 1452 (C.D. Cal. 1988), and found that "Although the tolling of the statute of limitations in a § 1983 action is usually governed by state law, Board of Regents v. Tomanio, 446 U.S. 478 (1980), the tolling provisions of California Government Code Section 945.3

do not apply because they would defeat substantive policy considerations underlying § 1983." (Memorandum of Decision and Order, Appendix B, p. B-5, Petition for Writ of Certiorari.) Thus, while apparently finding Section 945.3 to be a "coordinate" prohibition/tolling scheme, the District Court impliedly found that, under the Supremacy Clause, the prohibition provisions had to yield as being inconsistent with the federal policies underlying the § 1983 action. As the result of this preemption, the District Court, agreeing with Mangels, at p. 1455, impliedly found that the purposive tolling provisions of Section 945.3 could not be prevailed upon without having been subject to Section 945.3's disabilities.

The Ninth Circuit Court of Appeals found Section 945.3 to be a "coordinate"

tolling rule of C.C.P. 340. Although it found that the prohibition provisions in paragraph one of Section 945.3 must fall under the Supremacy Clause, it found that the tolling provisions of Section 945.3 are consistent with and, in fact, serve the objectives behind § 1983 actions and, therefore, do not fall under the Supremacy Clause.

Amicus Curiae City of Vallejo (hereafter "amicus") in support of the Petitioners, apparently confused the concept of a statute being unconstitutional with the concept of being preempted under the Supremacy Clause. It contended that a rule of severability makes partial invalidation of a statute improper where it would be contrary to legislative intent. Amicus asserted that Section 945.3 "must fall in its entirety because the California

Legislature would not have enacted the valid part had it known that the rest would fail to pass Constitutional muster." (Brief of Amicus, p. 3.)

III.

ARGUMENT

A. Section 945.3 Prohibition/Tolling Rule Under Considerations of Younger v. Harris.

Consideration of Younger v. Harris, 401 U.S. 37 (1971), and its progeny, mandate the application of some form of tolling rule vis-a-vis § 1983 actions while related state criminal prosecutions are pending. The Respondent in the case at bar, like the plaintiff in Younger, claimed that the state prosecution itself inhibited his exercise of First Amendment Rights. Respondent relied on the

application of Government Code Section 945.3, through Tomanio borrowing rules, and did not file his § 1983 complaint while the state criminal prosecution was pending. However, it is clear that had Respondent acted upon Petitioners' hypothesis that Section 945.3 is inapplicable to § 1983 actions, and proceeded to file, that said § 1983 action (which may have sought equitable relief in addition to damages at that point in time) would have been dismissed pursuant to the Younger doctrine had equity been sought.[4]

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[4]The Court, in Younger, gave several related justifications for its decision. Among them that equity should not restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution are not in themselves 'irreparable.' Such a rule prevent[s] erosion of the role of the

However, it is further arguable that this court would apply Younger to § 1983 damage actions such as in the case at

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jury and avoid[s] a duplication of legal proceedings and legal sanctions." Younger, at p. 44. Moreover, the concept of comity, a "proper respect for state functions," is intimately related to the nature of federalism:

> " . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." Younger, at p. 44.

Under Younger, federal Section 1983 equitable relief would not be available where the federal plaintiff has already engaged in conduct which is possibly criminal but is arguably constitutionally protected, and asserts he or she wishes to engage in such conduct in the future. The Younger rule differs from abstention in mandating outright dismissal of the federal claim in deference to the state criminal proceedings.

bar. On grounds of mootness, this court declined to consider whether a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself. Tower v. Glover, 467 U.S. 914 (1984). This court left open the applicability of Younger to § 1983 damage complaints in Juidice v. Vail, 430 U.S. 327 (1977). The Eighth Circuit applied Younger to bar a § 1983 damages action against police officers while criminal litigation was pending. McCurry v. Alle, 606 F.2d 795 (8th Cir. 1979), rev'd on other grounds, 449 U.S. 90 (1980). In Deakins v. Monaghan, 484 U.S. 1983 (1988), this Court declined to consider "the extent to which the Younger doctrine applies to a federal action seeking only

monetary relief." Deakins, at 202, (emphasis added). While the majority and the concurring opinions appeared to agree that Younger has some applicability to federal damages actions whose resolution could affect pending state proceedings,[5] the majority stated that the District Court had no discretion to dismiss, but only to stay, damages claims that could not be redressed in the state proceedings. The concurring opinion took the position that Younger required the District Court to stay the damages claims as a matter of policy. While it may be true that the applicability of Younger to damages actions is arguably an open

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[5]In the case at bar, the effects of the criminal proceeding upon substantive issues such as probable cause, res judicata, collateral estoppel -- not to mention the procedural and practical ramifications -- are substantial.

question in this Court, the rule in the Ninth Circuit under Mann v. Jett, 781 F.2d 1448 (9th Cir. 1986) (per curiam), at the time of filing this § 1983 action, was that Younger did apply to damages actions. However, more recently, the Ninth Circuit has determined that the District Court erred in dismissing a damage action on the basis of Younger where the 1983 plaintiffs could not adequately litigate their damage claims in the state court proceeding. Lebbos v. Judges of the Superior Court of Santa Clara County, 883 F.2d 810 (9th Cir. 1989).

On the assumption that Younger would apply to a § 1983 damage action while a state criminal prosecution is pending, if only to stay rather than dismiss the action, the net result is the defeat of the same policies underlying § 1983

actions that Petitioners, Amicus, the Mangels decision, the District Court and the Ninth Circuit decision in the case at bar claim are defeated by the prohibition rule set forth in Section 945.3. It would make little sense to determine that Section 945.3 does not apply to § 1983 damage actions under the Supremacy Clause, because of inconsistency with the paramount policy of open and immediate access to the federal courts to vindicate constitutional rights, when the federal forum would then just invoke the Younger abstention doctrine to stay the § 1983 action pending the outcome of the state criminal proceeding.

There is a fundamental conflict and counter-balance between the policies underlying the § 1983 action and the policies underlying the Younger doctrine. While in one direction we want

individuals to be able to vindicate important Constitutional rights against their erosion by unconstitutional state action; in the other we also want states, under our federal system of government, to have a degree of autonomy in the exercise of legitimate state judicial processes. Petitioners' professed concern for the policies protecting the immediate vindication of constitutional rights notwithstanding, they would have been quick to attack those policies by seeking Younger abstention if Respondent, in the case at bar, had filed his § 1983 during the pendency of the state criminal prosecution. Precaution, if not sensible and healthy suspicion, would lead a reasonable person to deduce that Petitioners are more concerned with an outcome-determinative manipulation of policies and theories to restrict or

limit state liability than they are with a consistent and harmonious interweaving of significant, but sometimes opposing, federal policies. Such a laissez-faire approach to legal philosophy, and its competing objectives, taken far enough ultimately results in chaotic and irrational governance.

Assuming, arguendo, that Section 945.3 prohibition does not apply during the pendency of a state criminal proceeding, in the federal forum there would be a requirement of (1) filing within the C.C.P. 340 one year period, (2) notice pleading and (3) Younger abstention. This really does not differ, except as to time periods, from the CTCA scheme combining claim presentation, litigation prohibition and tolling. If the state claim presentation requirement is non-applicable to § 1983 actions, it

makes little sense to import an analogous federal requirement into the § 1983 action. If by the extension of Younger to § 1983 damage actions, there first occurs a requirement that notice be given by filing the action and, secondly, there occurs a mandate that the litigation be stayed or prohibited during the pendency of the criminal prosecution, we have unwittingly adopted a de facto analogous federal claim presentation requirement that was abandoned at the state level. A system of filing, staying and retaining jurisdiction is tantamount to a system of claims presentation, litigation prohibition and tolling -- just different words. Yet the net affect of the mechanical and technical application of a Younger type abstention rule is to reintroduce a claim requirement at the

federal level that has long been jettisoned at the state level.

The Younger scheme (of filing, staying and retaining jurisdiction of the § 1983 action), importing as it does the extra baggage of filing a claim becomes unnecessary if a coordinate, that is, functional, state tolling rule is adopted that simultaneously prohibits and tolls the § 1983 action during the pendency of the state criminal proceeding.

It is the tolling aspect of Section 945.3 and the analogous retention of jurisdiction element of the Younger abstention scheme that are the common grounds or elements that can be identified in the two systems. It is precisely the commonality between the tolling/retention of jurisdiction elements that becomes the nexus, bridge, connection or key that harmonizes the two

competing objectives of decentralization or discrete federalism in government and national protection of constitutional rights.

Aside from the extra baggage of a new federal notice requirement that would attach to a mechanical application of Younger, within a framework of a one year statute of limitation, the preclusion effect of the staying of an already filed action under Younger and the prohibition effect of Section 945.3 both operate along the same vector to further the discrete policies of decentralization or federalism and, in the contra-positive, both operate to undermine the policies of broad and immediate access to a forum for the vindication of constitutional rights underlying § 1983. Therefore, it cannot be a violation of the Supremacy Clause to adopt a state rule of prohibition if one

is simultaneously going to posit a federal rule of staying. In terms of ultimate application of the Supremacy Clause, one must determine which federal policy is to be given supremacy, namely, federalism or the immediate vindication of national constitutional rights. If the policies underlying federalism are to be paramount, then the prohibition/staying element of such scheme cannot be in conflict with or inconsistent with the ultimate federal policy of federalism under the Supremacy Clause and the arguments of the Ninth Circuit's decision, as well as those of Mangels and Petitioners, would be erroneous to that extent. If, on the other hand, the policies underlying the § 1983 cause of action of vindication of national constitutional rights of individuals is to be the paramount

federal policy under the Supremacy Clause, then both the Section 945.3 prohibition and the Younger preclusion effect of staying would both have to fall by the wayside in relationship to the § 1983 action.

A decision tree-type analysis is of help in approaching a solution to the overall puzzle. First, the paramount federal policy must be identified -- federalism or vindication of national constitutional rights. Secondly, if § 1983 vindication is selected, then both Section 945.3 prohibition and Younger abstention fall by the wayside under the Supremacy Clause. If, on the other hand, federalism is selected as the paramount federal policy, then whether the Wilson/Tomanio scheme of borrowing of the state personal injury statute of limitations and coordinate, i.e.

functionally related, tolling exceptions applies in the first instance (where a state such as California has adopted a state prohibition/tolling statute) or the Younger scheme (of filing within a state personal injury statute of limitations sans prohibition/tolling exception, and, then, staying/retaining jurisdiction) clicks-in in the second instance -- makes little difference. A state ought to have the right to either adopt or not adopt a prohibition/tolling rule in the first instance under the philosophy of the supremacy of a policy of federalism. If, unlike California, the state does not adopt a prohibition/tolling rule, in the first instance, then, and only then, would the application of the Younger abstention (staying and retention of jurisdiction) doctrine click in to effect the same result of imposing a philosophy

predicated on the supremacy of federalism. The net result of not supplanting the state prohibition/tolling rule with the Younger abstention rule in the first instance, would be to avoid inconsistency in the application of federal policy and to allow the § 1983 action to further its own exclusive policies within the constraints and bounds of federalism by not being forced to adopt in the first instance a de facto federal claim presentation rule as the direct result of substitution of Younger abstention in the context of the notice pleading requirements of the Federal Rules of Civil Procedure.

Respondent submits that considerations of federalism ought to be the paramount federal policy operative under the Supremacy Clause when juxtaposed with the very important goals

of the vindication of national, constitutional rights. The supremacy of policies of federalism establishes the necessary order within which the national vindication of individual, constitutional rights can occur. Without the primacy of order, the vindication of individual, constitutional rights would quickly destroy themselves by destroying the very fabric of minimal order necessary to sustain those individual, constitutional rights. Applying this analysis to the case at bar, Respondent submits that the Ninth Circuit's decision in Harding should be affirmed in part as to tolling and reversed in part as to the finding that California's Section 945.3 prohibition rule must fall under the Supremacy Clause.

B. **Section 945.3 Is A Coordinate Tolling Provision Of C.C.P. 340.**

Petitioners and amicus attempt to sell us the proposition that Section 945.3 is not a "coordinate" tolling provision of C.C.P. 340. In doing so they, in fact, have urged the adoption of a new tolling rule. They have grasped onto a word, "coordinate," that was first used in Board of Regents v. Tomanio, 446 U.S. 478 (1980), in passing. By over-emphasizing it and suddenly defining it they emerge with a new tolling rule heretofore totally unprecedented. It results not merely from an interpretation of the Tomanio decision in a new context. The rule urged by Petitioners gives a new and more policy-restricted interpretation to the Tomanio decision. It creates a new concept of "coordinate tolling rules" not implicit in Tomanio and its progeny.

In Tomanio, the one-time, almost incidental use of the phrase "coordinate tolling rules" in dicta was not defined. The navigational, astronomical or mathematical imagery connoted by this phrase does not appear to convey any more than an unspecified general, meaning of relatedness, connection, or application. Or, the Court may have meant no more than a concept of equality between the statutes of limitation and their exceptions in the adjectival use of the word "coordinate." There were no criteria or standards set forth therein for determining exactly what these rules ought to be. The discussion in Tomanio of the fact that the State of New York had codified in one place all the tolling rules along with the statutes of limitation, implied that in other jurisdictions that might not readily be

the case. The discussion of the codification of the New York tolling rule pointed up a convenience in arrangement of New York statutory law, not a rigid formulation, test or necessity. An examination of tolling rules will show that they are not rigidly determined by a formula that selects them according to how they are arranged in time and space. Precedent shows that tolling rules are related to statutes of limitations along logical, practical and functional lines, as opposed to spatial and temporal proximity.

A test of "coordinate" tolling rules is an ordering principal, that universally, and not just in New York or California, relates, connects, matches and applies tolling rules to statutes of limitation. Such a universal ordering principal by definition cannot be the

location or arrangement of the tolling provisions within a codified system of statutory law.

Tomanio found that, under the reasoning of the Supreme Court's decisions in Robertson v. Wegmann, 436 U.S. 584 (1978); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); and Monroe v. Pope, 365 U.S. 167 (1961), federal courts were obligated not only to apply the analogous state (New York) statute of limitations to Respondent's federal constitutional claims, but also to apply the state's (New York's) rule for tolling that statute of limitations.

The immediate response to the problem of determining which among several alternative state tolling rules to apply might be to look at the state's legislative intent in enacting the

particular tolling provisions. Which were intended to apply? However, often such intent is not made explicit and can't be inferred from the statutory language itself. The language of Section 945.3 is broad and all-encompassing. It counsels that the intent of the legislature was that Section 945.3 would be a "coordinate" tolling rule for "any applicable statute of limitations for filing and prosecuting these actions . . . " The phrases "these actions" incorporates a portion of another paragraph, the prohibition provisions, where it is defined as " . . . a civil action for money or damages against a peace officer . . . based upon conduct of the peace officer relating to the offense for which the accused is charged . . . " (Appendix E, p. E-1, Petition for Writ of Certiorari.) Section 945.3 is further

divided into separate paragraphs, each with its own purpose. Each separate paragraph of Section 945.3 could stand alone in its purpose and meaning except for the first paragraph embodying the "prohibition" provisions, which on its face would not pass constitutional muster without the corollary tolling provisions.

However, it is often not enough to look to the statute itself to infer the legislative intent on a particular point. One must further look to the practical purpose to be served by the statute and its logical and functional relationship to the underlying state policies sought to be implemented. It would be of only slight significance to determine the

spatial and chronological arrangements of the tolling provisions within the code.[6]

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[6] As stated in Johnson, at 463-464 and quoted in Tomanio, at 485-486:

"Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." (Emphasis added.)

A fundamental legal issue that emerges from the case at bar is whether the state intended that a specific tolling provision might apply to a specific statute of limitation. Petitioner, here, alleges that the State of California did not intend Government Code Section 945.3 to apply to C.C.P. Section 340(3). That this is not only

C. **California Law Is Clear That Provisions Of The CTCA Apply To § 1983 Actions If They Are Not Inconsistent With Or Discriminatory Against Federal Law and Policy.**

The basic import of Williams v. Horvath, 16 C.3d 834; 129 Cal.Rptr. 453, 548 P.2d 1125 (1976) is that the provisions of the CTCA are applicable to

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not necessarily true, but also lacks persuasive probability, is demonstrated in the express, absolute, language of Government Code Section 945.3, itself.

The clear language of this statute makes it functionally applicable and coordinate with C.C.P. Section 340(3) whether the legislature intended this result or not. It should, therefore, be presumed that the legislature intended that it should apply. At least it is clear that it cannot be fairly stated that the legislature intended that it not apply to C.C.P. Section 340(3). Although it cannot be stated with certainty that the legislature intended that it apply, it can be said with some persuasive force that the legislature did not intend that it not apply.

a § 1983 action, but that certain provisions of the act are preempted by the federal legislation. Williams confirms that California courts, themselves, believe that CTCA applies to § 1983 actions where not preempted under the supremacy clause by the federal constitution, statutes, policies or U.S. Supreme Court case law interpreting same.

Any limitations Williams placed on the application of the CTCA to 1983 actions arises from any conflict the former state act may present to the implementation of federal policies. " . . . While it may be constitutionally permissible for the Legislature to place this substantive impediment in the path of a state cause of action, it is clear that the supremacy clause will not permit a like abrogation of the perquisites of a federal civil rights litigant."

Williams, p. 842. Williams held the claim provision of the CTCA to be inoperative in an action brought under § 1983.

Moreover, Williams then explicitly goes on to state "There are, however, certain sections of the Tort Claims Act which would not inhibit the attainment of the objectives of the Civil Rights Act . . . " In this respect, the case at bar is similar to Williams. Section 945.3, like Section 825 of the CTCA (indemnification), contains nothing in its language to suggest that a civil action against a police officer is to be prohibited and tolled "only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in Section 825 [substitute 945.3] to any

claim or action negates this inference." Williams, p. 843.

Again in sync with Williams, "nor, as an analysis of the leading federal cases shows, is there anything in § 1983 which precludes a state from indemnifying public employees [substitute tolling the statute of limitations] when liability is founded upon that section." Williams, p. 843.

The Williams case also provides a concrete example of how the CTCA and the Civil Rights Act may positively interface with one another where the net affect is to enhance the federal policies involved.[7]

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[7]"Secondly and most importantly, entirely different considerations prevail in determining application of the claim requirement and the indemnification provisions of the Tort Claims Act. With regard to the claim section, the question is the extent to which state procedural obstacles may be invoked to obstruct the

D. **The Petitioners And Amicus, Representing The Interest Of State and Local Government, Seek A Discriminatory, Outcome-Determinative Result In The Case At Bar.**

In the case at bar, Petitioners and Amicus would like to see Section 945.3 rendered totally inapplicable to § 1983 actions. Application of the Supremacy Clause to either partially or entirely preempt Section 945.3 as applied to § 1983 actions, would leave Section 945.3 totally intact with respect to analogous state law causes of action. While

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rights of plaintiffs relying on federal law. On the issue of indemnification, however, there can be no charge that these provisions obstruct invocation of the federal right; on the contrary, they enhance that right by ensuring that the individual employee is able to meet his responsibilities." Williams, p. 847.

Petitioners and Amicus desire to maintain their policy edge in state law remedial actions, they apparently believe that there is no way around the partial preemption of the prohibition provisions of Section 945.3 as the result of the implementation of the policies underlying § 1983 actions through operation of the Supremacy Clause. However, as between partial preemption and total preemption, the Petitioners and Amicus much prefer total preemption as the lesser of two evils. Partial preemption confers an option beneficial to the claimant seeking remedial action. Whereas total preemption forces the claimant into a practically untenable situation of having to psychologically and monetarily pursue two fronts of the war simultaneously. In most cases this would practically force an election to abandon the civil remedy

in favor of mounting a criminal defense. However, under total preemption, claimants' § 1983 action would most likely be stayed pending the outcome of the criminal proceeding under policies analogous to or extending Younger v. Harris thereby indirectly giving the state and local government the benefits of prohibition while, simultaneously, forcing the additional burden of filing on the claimant within the primary period of limitations. This, of course, would be tantamount to the importation of a notice requirement into the § 1983 action.

Thus, it is clear that Petitioners and Amicus desire a result that discriminates, and Respondent believes unfairly so, between the § 1983 causes of action and the state analogs to those causes of action. Another way for

Petitioners and Amicus to reach this same discriminatory result is manipulation of state tolling legislation by application of their concept of "coordinate" tolling rules. This can now be effected, in part, because of the states' fore-knowledge of the § 1983 commitment to the general personal injury statutes of limitation under applicable borrowing rules, and their ability to adjust other "non-coordinate" tolling rules accordingly.

A state tolling rule which tolls the limitations period for those who are imprisoned but not for "federal civil rights cases" may not be applied to § 1983 claims, because it discriminates against § 1983 claimants. The fact that a state need not provide for tolling during imprisonment "does not mean that a state may provide tolling for state

claims but refuse to do so for analogous federal claims and have this discrimination incorporated as federal law." Hughes v. Sheriff, 814 F.2d 532, 535 (8th Cir.), appeal dismissed and cert. denied, 108 S.Ct. 46 (1987). The court applied a state tolling rule free of the discriminatory provision. See, also, Campbell v. Haverhill, 155 U.S. 610, 615 (1895).

Petitioners want us to believe that federal law would permit a double standard for civil actions against police officers that discriminates against the federal § 1983 action. Under Petitioners' suppositions, if an action was filed as a § 1983 action, whether in a federal or state forum, there would be no tolling of the limitations period while a potential plaintiff was being criminally prosecuted. However, if an

action is filed as a CTCA action, it would be dismissed (prohibited) and the period of limitations would be tolled as long as any criminal action was pending. This is a clear discrimination between the state cause of action and the federal cause of action. Moreover, this double standard subverts the very state policies for which the state prohibitory and tolling statute was enacted. Ultimately, the federal policies underlying § 1983 would also be subverted either by the claimants' practical need to abandon the § 1983 action to defend a criminal action or by the application of the Younger doctrine.

"Coordinate" tolling provisions should not be a buzz word for separate and discriminatory tolling provisions: one treatment for state causes of actions against police officers, and a completely

opposite treatment for federal causes of action against police officers. It well serves the state to prohibit and toll state actions against officers while criminal proceedings are pending against the potential plaintiff. Civil actions that otherwise could become "bargaining chips" and discovery devices are postponed until after the criminal proceeding. If the criminal proceeding results in a conviction of the potential plaintiff, it becomes improbable that any civil action would be filed and scarce judicial resources are then preserved. A drawback of any prohibition scheme is that it presents an opportunity to law enforcement to engage in an abuse of process or a malicious prosecution. Where a victim of wrongful police activity makes or threatens to make a complaint against such authorities,

spurious criminal charges could be filed against the potential plaintiff in retaliation and/or in an attempt to derail his complaint against wrongful police activity.[8]

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[8]The commencement of criminal proceedings without probable cause would create a number of obstacles to a plaintiff seeking compensation for a wrongful police action. He would have to suffer the inconvenience, embarrassment and expenses of standing trial. This is no little concern. He would also be subject to criminal penalties that would have some strong probability of realization particularly where perjury, politics and admissibility of evidence intermix. Even if the peoples' case appeared to be fatally weak, there would be a strong probability of plea bargaining which would result in some kind of conviction or an admission of probable cause. Another obstacle to the civil action is the delay of time that the prohibitory provision would cause. Time delay has the natural effect of taking the sting out of events, causing a reshuffling of priorities and interposing multiple practical problems of proof, convenience, memory, resources, etc. However, assuming a potential plaintiff in a police misconduct case has the patience of Job, the resolve of principle, the resources and the nerve to risk conviction (with all of its manifest

While it serves the state's interest to prohibit and toll state causes of action against police officers while a criminal proceeding is pending, it seems that it best serves state interests if the federal cause of action can be forced to be prosecuted, if at all, simultaneously with the plaintiff having to defend a criminal prosecution. This anomaly arises from the fact that the Supremacy Clause and federal policy has prohibited a state from prohibiting prosecution of a civil rights claim while a state criminal prosecution is pending. If such invocation of the Supremacy

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negative impact on family, career, business and lifestyle), as well as the bucks to successfully navigate through to an acquittal of criminal charges, he might wind up with an enhanced complaint against state authorities which could possibly include malicious prosecution and/or abuse of process.

Clause is justified, it would best serve state interest to make the prosecution of the civil rights claim as difficult as possible by forcing the duplicative and simultaneous expenditure of resources. It would not serve state interest to merely toll the time within which the federal claim could be filed thereby giving the potential plaintiff the option of proceeding with his action at a time that allows the focus and concentration of time, effort, and resources.

A pivotal difference that distinguishes the case at bar from those cases applying state tolling provisions for prisoners that are incarcerated is that, while such tolling provisions are clearly enacted by the state for the benefit of the prisoner, the tolling of a case during a prohibitory period created by the state (the period while a criminal

prosecution is pending) is, clearly, a tolling to further a state interest.

However, such an interest is not limited to a state interest. It does not take a stretch of the imagination to realize that the same scenario could develop during a federal criminal prosecution that might involve federal law enforcement. A policy of tolling a potential civil rights action, whether a § 1983 or Bivins-type action, while a federal criminal prosecution was pending would serve both the interest of the government and the potential plaintiff simultaneously. The § 1983 policies of compensation and deterrence would be served, and so would government interests in precluding civil discovery and use of a civil action as a bargaining chip while a criminal action is pending.

Courts should not unravel state limitation rules unless their full application would defeat the goals of the federal statute at issue. Hardin v. Straub, 109 S.Ct. 1998 at 2000 (1989). If by "unraveling," the Supreme Court means dividing tolling, revival, application and limitation provisions, and selectively choosing among them, the Ninth Circuit decision appears to be in unison with this caution in that it does not peel off the state's tolling provisions but, rather adopts them. In recognizing preemption of the prohibitory provisions -- of bringing a civil rights action while a criminal prosecution is pending -- as a consequence of the Supremacy Clause, the appellate court did not unravel the state's limitation rules. Rather, it preserved the coordinate tolling rules while only dropping the

prohibitory language which, considered in itself, was clearly inconsistent with the policies underlying the § 1983 action. Such "unraveling" of the state's statute (California Government Code Section 945.3) that this may be is not an unraveling of the state's limitation and coordinate tolling rules, but, rather, their adoption. Contrary to representation, but according to actual fact, it is the Petitioners and Amicus who are attempting to unravel the states' rules of repose in the case at bar by "decoupling" the statute of limitations from its coordinate rule of tolling. Moreover, the practical effect of the Court of Appeal's decision in Harding will obviously further the state's own policy behind its statute (by limiting, if not precluding, civil discovery and bargain-chip leverage while a criminal

prosecution is pending). It is highly improbable that the majority of § 1983 actions of this sort would be brought simultaneous to any criminal prosecution, but much more likely (as a pragmatic consideration of resources, convenience, unnecessary litigation, etc.) that such actions would be brought only subsequent to the criminal prosecution.

The appropriate state statutes of limitations and the coordinate tolling rules are, in the first instance, posited by the state as a legislative choice. They become binding rules of law unless they are negated or vetoed as being discriminatory or inconsistent with the Constitution and laws of the United States. In the case at bar, Petitioner's interpretation would require us to defer to the state's intention in mixing and matching of state statutes of limitations

and tolling provisions regardless of discriminatory effect. This formula would clearly be unwise. It would open the door to the state being able to place prohibitory/tolling provisions in codes in a manner that could discriminate against the federal civil rights statute. By disengaging a tolling provision from the Wilson v. Garcia determined limitations period, the state could obviate its application to federal causes of action or contrapositively limit its application to creative legislation of state causes of action. However, it should be apparent that the determinant of what is a "coordinate tolling rule" should not be its chronological or spatial location within a state's statutes, but rather the functional linkage the tolling provision has to a limitations period in a particular case.

As noted in Felder v. Casey, 108 S.Ct. 2302 (1988), the avoidance of potential state discrimination against the federal Civil Rights Act was one of the primary purposes in selecting a state's general personal injury period of limitations as the one to be applied in § 1983 actions:[9] However, in the case at bar, Petitioner does not merely advocate a form of discrimination however detrimental to the federal right between types of defendants. (See, Felder, p. 2310), or between applicable procedures depending on which forum the action is

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[9]"In Wilson, we held that, for purposes of choosing a limitations period for Section 1983 actions, federal courts must apply the state statute of limitations governing personal injury claims because it is highly unlikely that States would ever fix the limitations period applicable to such claims in a manner that would discriminate against the federal right." Felder, p. 2310.

tried, but here advocates direct discrimination against the federal cause of action itself, regardless of whether said cause of action is pursued in a federal or state forum.

To attempt to differentiate or discriminate in this manner between the federal Civil Rights Act and the analogous state causes of action not only undermines the state policies underlying the state prohibition and tolling provisions, (as well as has the practical effect of undermining the federal policies of compensation and deterrence equatable with the § 1983 cause of action), but sets up a paradigm to discriminate against federal causes of action that might successfully evade or obviate the Supremacy Clause. By not imposing an affirmative discriminatory burden on the federal cause of action,

but by limiting application of a beneficial tolling provision solely to the analogous state cause of action, a form of discrimination is presented that does not run afoul of the Supremacy Clause because something cannot be pre-empted that has not been posited. Moreover, the State of California, as a practical matter, following Petitioner's philosophy, would wind up with the best of "both possible worlds" in terms of maximizing the goal of restricting and obstructing remedial causes of action against governmental persons and/or agencies.

E. Section 935.3 Was Not Severed As Alleged By Amicus.

As noted in the summary of argument, amicus have apparently confused constitutional invalidity with the doctrine of preemption under the

Supremacy Clause. Section 945.3 remains valid for any purely state law applications. The prohibition provisions were not severed from the tolling provisions. Under the operation of the Supremacy Clause, the prohibition provisions simply have no effect.

Amicus further argues that the legislature would not have enacted the tolling provisions of the statute had it known that the prohibition provision would fall under the Supremacy Clause. This statement implies Amicus' belief that the legislature intended that Section 945.3 be a coordinate tolling provision of Section 340.3 as applied to § 1983 actions. By establishing a cause and effect relationship between what the legislature would have done had it anticipated preemption, amicus is, in effect, admitting the legislature's

intent that the two statutes be coordinate. If the legislature intended that the two statutes not be coordinate then they would be unconcerned with any impact of the Supremacy Clause and would have enacted Section 945.3 in any case as purely state law legislation. Moreover, the legislature must be presumed to have been aware of the § 1983 action and the 1980 Supreme Court Tomanio decision when it enacted this legislation in 1981 and, again, amended it in 1983.

It is probable that the legislature intended the tolling provisions to be severable. The language of the tolling provisions as well as its isolation in a separate paragraph confirm this. The tolling provisions, other than incorporating a definition of the word "actions," does not make any reference to the prohibition provisions, but purports

to stand alone as an independent tolling rule.

Amicus' statement that the Court of Appeal's sustaining of the remaining valid tolling provisions would accomplish a result different than that intended by the legislature is also untrue. The tolling provisions standing alone, as noted by the Ninth Circuit's Opinion, independently promote the state's policies underlying the legislation. They encourage a complainant to wait until after the criminal proceeding has terminated and, therefore, further the state's objectives of limiting bargaining levers and restricting discovery into prosecutorial information.

Just because the tolling clause is independent does not mean that it is not related to the prohibition clause. Its relationship to another clause, which

takes the optional tolling a step further by positing a mandatory prohibition rule, does not preclude the tolling aspect from standing alone. While Amicus would have this Court believe that the two provisions are inextricably intertwined, with the former [the tolling] entirely dependent on the latter [the prohibition], in fact, just the opposite is true. It is precisely the prohibition clause that is entirely dependent on the tolling clause and that could not stand alone. The prohibition clause, by itself and on its face, would be invalidated, not preempted, as an unconstitutional violation of due process.

As one studies Amicus' argument it becomes clear that the Ninth Circuit was cognizant of and properly applied the law concerning severability. "Unless it is evident that the Legislature would not

have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

IV.

CONCLUSION

It is clear from the color and tenor of Petitioner's arguments that it is treating the State of California statute of limitations and the coordinate tolling rules as a technical obstacle to be circumvented if possible. The Petitioner's petition would certainly undermine the substantive policies underlying the State of California's tolling rule. Following their advice, § 1983 actions not only could be used as

bargaining chips, but would be so used and would open the door for civil discovery -- the two precise affects and practices that the State of California expressly wanted to eliminate in the enactment of Government Code Section 945.3.

If § 1983 actions must be prosecuted within the general personal injury statute of one year, while concurrent criminal proceedings are transpiring, then, a fortiori, neither a state nor a federal court would be in any position to stay the civil rights proceedings pending resolution of the criminal matter. It would be a technical farce for a requirement to be laid down that a civil rights action must be <u>filed</u> within a one year general personal injury period, and not tolled pursuant to a state's express tolling rule governing analogous state

actions, but then stayed during the period any state/federal criminal proceedings are pending to avoid waste of judicial resources, bargain chip and discovery tactics, not to mention the impossible practical difficulties presented to the § 1983 Claimant in defending against a criminal prosecution while simultaneously trying to prove the guilt of his accusers in the civil proceeding.

If it is against federal policy -- the Supremacy Clause -- to prohibit the filing of a civil rights action pending resolution of a criminal proceeding arising out of the same incident, then it is equally against that clause to stay a civil rights action that has been filed pending resolution of the criminal proceeding. To permit the latter (the staying of the civil rights action),

while requiring the filing, reduces the § 1983 filing to an absurd and technical act. If the policy arguments which underlie the § 1983 action -- compensation, deterrence, broad access to the courts for remedial action, etc. -- are strong enough considerations to disallow the prohibition of the action, then they are strong enough considerations to disallow the staying of the action. To allow "staying" would undermine the disallowance of prohibition and reduce all of the policy arguments in favor of the latter to the absurd.

On the basis of the foregoing, Respondent respectfully asserts that the Petition For Writ Of Certiorari be denied. If, on the other hand, it is granted, then Respondent respectfully asserts that the decision of the Court of Appeals ought to be affirmed to the

extent that it found Respondent's complaint to be timely under the tolling provisions of Section 945.3, and reversed to the extent that it found the "prohibition" provisions of Section 945.3 to be preempted by the Supremacy Clause.

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Respectfully submitted,

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